IN THE

Supreme Court, U. S.
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SUPREME COURT OF THE UNITED STATES

October Term, 1974

No 74-239

STANLEY V. TUCKER,
Petitioner

-v-

JOSEPH D. MAHER, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

STANLEY V. TUCKER
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IN THE

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No _____

STANLEY V. TUCKER,

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-v-

JOSEPH D. MAHER, et al.

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered May 5th, 1974. Timely petition for re-hearing was filed and denied June 5th, 1974.

PRIOR ACTION BY THIS COURT

A prior petition for certiorari was granted by this Court April 17th, 1972, 405 US 1052. Substantially the same issues

are involved in this appeal and similar reasons exist for granting this petition; namely the 2nd C. A. again has failed to follow critical rulings of this court and has ruled contrary to decisions of the UNITED STATES SUPREME COURT and other Circuit Courts of Appeal.

CITATION TO OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Second Circuit is printed in the Appendix hereto, infra D-1, the Opinion of the Three-Judge District Court, _____ F 2d _____, July 9th, 1973, Appendix infra C-1.

JURISDICTION

The Petition for Re-Hearing was denied June 5th, 1974, Appendix E-1. The jurisdiction of this court is invoked under 28 USC 1254 (1)

QUESTIONS PRESENTED

1. Where Congress did not include any "bad faith" - "good faith" limiting language in 42 USC 1983 nor in the 5th nor 14th Amendments to the U. S. Constitution can the 2nd C. A. on its own inject such limitations or defenses?

2. Where all decisions of the UNITED STATES SUPREME COURT involving pure federal constitutional cases have held "good

faith" is not a defense can the 2nd C. A. rule contrary thereto?

3. Where Petitioner clearly stated all the requirements of two state torts, namely fraud and abuse of process neither of which require "bad faith" in the state courts can the 2nd C. A. inject a "bad faith" - "good faith" defense on these torts in federal court?

4. Is not Petitioner entitled to a trial on the factual issue of "good faith" rather than being dismissed on motion?

5. Are not the allegations of FRAUD in the complaint and amended complaint the purest "bad faith" possible?

6. Where this action has been on appeal for almost four years should not Petitioner be liberally granted a right to amend his complaint (Rule 15 FRCP) to adapt to changed facts and law?

CONSTITUTIONAL & STATUTORY PROVISIONS

This action challenged the constitutionality of Conn Mechanic's Lien Law, G. S. 49-33, and Conn G. S. 52-279, G. S. 52-280, and G. S. 52-285 permitting attachment of real estate without notice or hearing. Declaratory relief, Injunctive relief and damages were prayed for. The action was originally dismissed in the District Court, dismissal upheld in the 2nd C. A. and certiorari granted and summarilly reversed by the United States Supreme Court, 405 U. S. 1052 bases on the recent decision in Lynch

v Household Finance, 405 U. S. 538.

On remand a Three-Judge District Court was convened to consider the constitutional questions. Under prodding by theCourt in open court the respondents relinquished to the presiding judge for delivery to Petitioner a release of the attachment. Two days after hearing and before decision by bhe three-judge court the Connecticut Legislature adopted Public Act 73-431 purporting to conform pre-judgment remedies in Co Connecticut to U. S. SUPREME COURT decisions. The Mechanics Lien statute complained of, G. S. 49-33 was never revolked or modified. On strength of above the three-judge court dismissed. as moot the entire case including the claim for damages.

STATEMENT OF FACTUAL BACKGROUND

The factual background leading to this action is that Petitioner, Stanley V. Tucker, a resident of Connecticut and a Building Contractor sued his alleged creditors, an electric sub-contractor, their attaching attorney and the attaching Sheriff. Fifty thousand dollars in damages are claimed. Both temporary and permanent injunctions were requested enjoining the levy of future mechanics liens or attachments without not tice or h aring. Temporary and permanent injunctions were requested ordering Defendants to forthwith release the instant attachments.

Pursuant to statutes complained of herein:

1. Conn Deputy Sheriff levied attachment on real estate of Appellant under construction.

2. The attachment impounded $16,000 in construction moneys sorely needed to pay construction wages and to sustain life.

3. The attachment was made without notice or hearing.

4. Appellant/Petioner claims the attachments to be:

a. fraudulent
b. violation of lien waiver
c. violation of lien release
d. made for purposes of "extorting" payment

5. Attachment was not needed to secure jurisdiction as Petitioner daily lives and works in Connecticut with no plans to leave.

6. The state court is powerless to release the attachments under Connecticut law.

7. The attachments impounding $16,000 deprivately needed to pay construction wages also deny to Appellant the fiscal means to post attachment bond under G. S. 52-304.

8. The publication of the lien by the defendants recording in the public records of the Town Clerk of Hartford damaged Peitioner's business reputation and credit standing causing substantial business losses all without procedural due process.

9. The impounding of $16,000 in construction moneys denied to Petioner his fundamental personal freedom to conduct the occupation of his own free choice.

10. The impounding of $16,000 in construction wages deprived construction workers, their starving wives, and crying children of the minimum funds necessary to sustain life.

SUBSTANTIAL REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with U. S. SUPREME COURT Decisions.

2. The primary thrust of Petitioner's complaint is a cause of action for damages as the three-judge court held injunctive relief mooted out. (although the mechanics lien statute 49-33 was never revoked or amended). The mooting was held due to delivery of a release of lien to the three judge court and two days after hearing the Conn. logislature revoked the attachment statutes purporting to conform to the decisions of the UNITED STATES SUPREME CT.

THE DECISION OF THE THREE-JUDGE COURT DISMISSING THE CLAIM FOR DAMAGES WITHOUT A TRIAL ANDWITHOUT LEAVE TO AMEND AND THE JUDGMENT OF THE 2ND CA UPHOLDING THE DISMISSAL IS IN SHARP CONFLICT WITH DECISIONS OF THIS COURT.

A. THE DECISION BELOW CONFLICTS WITH BIVENS v SIX UNKNOWN FEDERAL NARCOTICS AGENTS. 403 U. S. 388 June 21, 1971

The decision below pinpoints the problem clearly (D-6) :

> "The question of what constitutes a constitutional tort under S 1983 has provoked learned comment but actual litigation has not provided us with much precedential material."

Again the confusion or uncertainty within the 2nd C. A. As to what constitutes a constitutional tort appears (D-11)

> "Constitutioal law, particuliarly in this difficult and confusing

> area of state action and due process, is hardly predictable with any degree of certainty. The very history recently of such constitutional litigation in this circuit should convincingly indicate the role of the prophet is precarious at best"

To which comment this Petitioner ernestly says : "AMEN! "

Yet there is no need for this mumbo-jumbo on the part of the 2nd C. A. - the very question so laboriously pounded in the decision below has clearly been resolved in piror decisions of this court including Bivens, supra.

In Bivens, supra, the U. S. SUPREME CT. held a private citizen under the civil rights act has a right to damages against federal agents for invasion of his fundamental 4th amendment rights. The case is remarkably analagous to this action where damages are requested due to injuries admittedly under color of state law to fundamental 5th and 14th amendment rights to due process and equal protection of the laws.

In Bivens, supra, dismissal in the district court was made on alleged grounds that the cause of action was a state cause and did not belong in the federal courts. So too, in this action by application of an "erronious" state law treatment the 2nd C. A. rationalized upholding the dismissal. But the U. S. SUPREME COURT rejected this approach" :

Bivens P 390: "We grant certiorari. We reverse" 399 US 905.

Bivens P 391: "we think respondents thesis rests upon an unduely restrictive view of the 14th Amendment's protection against unreasonable searches"

So once again in this action This Court is requested to declare the 2nd C. A. thesis as being.....

"unduely restrictive

Bivens P 395: "Third. That damages may be obtained for injuries consequent upon a violation of the 4th Amendment by federal officials should hardly seems a surprising proposition. Historically, damages have been regarded as the ordinary remedy for an invsion of personal interests in liberty. Nixon v Condon, 286 US 73. "

Bivens P 396: "Of course, the 4th Amend. does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation. But " it is.... well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available means to make good the wrong done" Bell v Hood 327 U.S at 684.

In this action this Petitioner prays aloud to this court to note what abuses to his chernished right to due process is subjected to by limitation by the 2nd C. A. "good faith - bad faith" mumbo - jumbo.

> "The very essence of civil liberty certainly consists of the right of every individual to claim the protection of the laws whenever he receives an injury."
>
> Marbury v Madison 1 Cranch 137

Thus this Court is asked to hold as it has in the past cases similar that Petitioner has been denied due process of law and is entitled to damages in federal court.

B. THE DECISION BELOW CONFLICTS WITH A MULTIPLICITY OF U.S. SUPREME COURT DECISIONS REJECTING "GOOD FAITH" - I FOLLOW THE STATE LAW" DEFENSES TO INVASIONS OF FEDERAL RIGHTS.

This court should take note here and now of an alarming trend in the lower federal courts to steadilly whittle away at the great rights and freedoms given to all American citizens by Congress and guaranteed by the Constitution and its Amendments.

Admittedly there is a narrow ground where a state judge acting within his jurisdiction is "immune" from federal civil rights statutes. The same is true of legislators.

For lower federal courts to keep extending and extending this "immunity" to police and then to sheriff and then to attorneys and then to litigants relying on

advice from attoeneys leaves the federal civil rights statutes torn to ribbons and without power because any and all defendants in federal civil rights actions will blatently proclaim they acted in "good faith". Look at this action replete with fraud and yet brazenly the defendants got away with the fake "good faith" defense in the 2nd C. A.

In Gamino v U. S. 275 US 310 Petitioners were convic ed of criminal conspiracy under permissible state law conduct. Despite the "good faith state law" argument this court reversed the conviction on 4th Amend. grounds. Similarly in Byas v US 273 US 28 Petitioner was convicted in good faith by a state judge under a valid state law warrant. This court refused to consider the "good faith" state law argument and reversed on federal grounds.

Similarly US SUPREME COURT decisions regarding electronic surveillance have made it clear beyond per-adventure that fundamental 4th amendment rights are not subject to "good faith" state law nicities of local trespass laws."

Katz v US 389 US 347
Berger v NY 388 US 41
Silverman v US 363 US 505

In light of these case the theory below that "good faith" following of state law permits wholesale invasions of due process and equal protection rights must be rejected.

C. THE DECISION BELOW CONFLICTS WITH BELL v HOOD 327 US 678

In Bell supra civil suit for damages for invasion of due process rights was dismissed in the district court - dismissl upheld by 9th CA under factual condisions similar to this action. This Court reversed.

Bell P 678: "Where the complaint seeks recovery squarely on the grounds of violation of plaintiff's rights under the 4th & 5th Amend. a federal district court had jurisdiction of a suit against agents of the Federal Government to recover damages in excess of $3,000 alleged to have been suffered by the plaintiffs as a result of such violations.. even though neither the Constitution nor the Congress has provided for the recovery of money damages for such violations and the complaint is so framed as possible to state a common law action in tort or trespass P 680 - 685."

In this action the 2nd CA explored the complaint and amended complaint and rejected a possible cause of action for the state tort of malicious prosecution. Yet this Petitioner never meant to state a c cause of action for malicious prosecution but contends he has pleaded facts sufficient for a state tort of fraud and a state tort of abuse of process. All the essential allegations appear in the complaint on file Appendix A. Due to the passage of four years while this action was on appeal including a prior reversal by the U. S. SUPREME COURT 405 US 1052

Petitioner would ask leave to amend in the district court. In addition to the two state torts, neither of which calls for a "good faith" defense the Petitioner has pleaded a federal constitutional tort for the denial of due process.

Bell P 680:

> Respondents make the following argument in support of the District Court's dismissal of the complaint for want of federal jurisdiction. First, they urge that the complaint states a cause of action for the common law tort of trespass made actionable by state law and that it therefore does not raise questions arising "under the Constitution or laws of the United States." Second, to support this contention, respondents maintain that petitioners could not recover under the Constitution or laws of the United States, since the Constitution does not expressly provide for recovery in money damages for violations of the Fourth and Fifth Amendments and Congress has not enacted a statute that does so provide. A more reading of the complaint refutes the first contention and, as will be seen, the second one is not decisive on the question of jurisdiction of the federal court.

D. THE DECISION CONFLICTS WITH SNAIDACH, BODDIE, GOLDBERG, LYNCH, INFRA AND A LINE OF DECISIONS AFFIRMING FEDERAL RIGHTS.

The 2nd C. A. has amazing reluctance to give up the old obstacles to vindicating federal rights in federal court, such obstacles long shattered into dust by decisions of the US SUPREME COURT, decisions binding on all district and circuit courts.

Opinion Appendix D- :

"It must be emphasized that there is no element of discrimination, racial or otherwise, in the case before us. Nor is there any deprivation of personal liberty involved. Although Lynch v Household Finance, supra, does give a federal court jurisdiction under S 1343 (3) of controversies involving deprivation of property, as well as those of personal liberty, the cases we have referred to indicate that it does not follow that the element of S 1983 scienter is identical."

The 2nd C. A. has long held and still clings tenaciously to the view that only personal rights are enforceable in federal courts subject to the 2nd C. A review and apparently still clings to these out moded concepts despite a long line of stiring civil rights decisions in this court.

Sniadach v Family Finance 395 US 337 : t 342:

Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing (cf. *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 423) this prejudgment garnishment procedure violates the fundamental principles of due process.

Reversed.

Another case arising from the USDC- Conn where the US SUPREME COURT upset the 2nd CA is Boddie v Conn 401 US 371. In Boddie challenge was made to the statutory scheme for charging divorce fees and costs. There was no "good faith" vs "bad faith" floated such as appears in this case. Nevertheless this court granted certiorari and reversed on constitutional grounds.

Another action from the 2nd CA was Goldberg v Kelly 90 S Ct 1011 where the 2nd CA just as in this case upheld a dismissal that state officers in "good faith" following state statutory scheme for regulating disbursement of welfare were immune from suit in federal court.

Not so said the US SUPREME COURT in granting certiorari and reversing. The mandatory federal rights were paramount and no "good faith" defense was permitted in light of the U. S. constitution.

Goldberg P 1017:

[1-4] Appellant does not contend that procedural due process is not applicable to the termination of welfare benefits. Such benefits are a matter of statutory entitlement for persons qualified to receive them.[8] Their termination involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are "a 'privilege' and not a 'right.'" Shapiro v. Thompson, 394 U.S. 618, 627 n. 6, 89 S.Ct. 1322, 1327 (1969). Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation, Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963); or to denial of a tax exemption, Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1955).

E. THE DECISION BELOW CONFLICTS WITH WISCONSIN v CONSTANTINEAU 91 S Ct 507

The Constantineau, supra, decision came in January 1971 after the 2nd C. A. had taken its "hard line" approach to its own narrow distinction between personal v property rights. A distinction that MYSTERIOUSLY melts away in the decisions of the 2nd CA where welfare recipients utilize federal process for vindiction of their rights to welfare handouts.

Nevertheless, the Wisconsin statute permitting posting of names of "excessive" drinkers without notice or hearing was held a denial of due process as a man"s right to a good reputation is a highly prized fundamental right that may not be lightly trampled into the dust by the state of Wisconsin. See P 4:

> [1] We reviewed in Cafeteria and Restaurant Workers Union, Local 473, A.F.L.-C.I.O. v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230, the nature of the various "private interests" that have fallen on one side or the other of the line. See also Sniadach v. Family Finance Corp., 395 U.S. 337, 339-342, 89 S.Ct. 1820, 1821-1823, 23 L.Ed.2d 349. Generalizations are hazardous as some state and federal administrative procedures are summary by reason of necessity or history. Yet
>
> certainly where the State attaches "a badge of infamy" to the citizen, due process comes into play. Wieman v. Updegraff, 344 U.S. 183, 191, 73 S.Ct. 215, 218-219, 97 L.Ed. 216. " *

Constantineau P 4 continued:

> * * * the right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168, 71 S.Ct. 624, 646, 95 L.Ed. 817 (concurring opinion).

Nevertheless we see here the 2nd CA literally butting heads with the US SUPREME CT. in helping the state of Conn. trample mud all over Appellant's business and credit reputation, highly valued personal assets in the business world today, under color of unconstitutional Conn. G. S. that permit Mechanic's Liens and Attachments to be filed without minimum procedural due process or notice and hearing before judgment.

Our nations very survival depends today on its onstruction industry's ability to provide homes and commercial buildings as the population continues to explode and as the core cities, slum infested, decay and rot. Of all the basic necessities the need for human shelter is second only to the need for food.

Where is there left any justification for the 2nd CA to declaim existance of "personal liberties " in this action in light of Constantineau supra?

See how blatently the 2nd CA avoids the thrust of Constantineau:

Appendix D- " Nor is any deprivation of personal liberty involved"

Nevertheless the personal freedom is at issue herein where this Petitioner's business reputation and credit standing was tarnished without notice or hearing by a self professed creditor by filing in the public records of the Town Clerk of Hartford a Mechanics Lien and then Writ of Attachment.

Constantineau P 437:

Yet certainly where the State attaches 'a badge of infamy" to the citizen, due process comes into play. *Wieman* v. *Updegraff*, 344 U. S. 183, 191. "[T]he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 168 (Frankfurter, J., concurring).

Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential. "Posting" under the Wisconsin Act may to some be merely the mark of illness, to others it is a stigma, an official branding of a person. The label is a degrading one.

Can there be any difference between the personal freedom of Mr Constantineau in Wisconsin to be federally protected from the stigma and disgrace of being publicly posted for "excessive drink" and the public "posting" of this Petitioner in the public records of the Town Clerk of Hartford for allegedly not payment of his debts?

II. THE ISSUE OF GOOD FAITH WAS IMPROPERLY DECIDED ON MOTION WITHOUT TRIAL ON THE MERITS.

The decision in the 2nd CA was based on the thesis that absent "bad faith" the respondents could forever repeatedly violate via illegal mechanics liens and wrongful writs of attachment this Petitioners federally guranteed rights without ever being made to respond in damages. The decision below is wrong.

Monroe v Pape 365 US 187
Rose Chalet Functions Corp v Evans
264 F Supp 790
Whirl v Korn 407 F 2d 781

This Petitioner feels the "bad faith" of the respondents was amply shown in the cmmplaint as follows See Appendix A & B.

1. Respondents accepted check for $1985
2. Respondents refused to return to complete contract work
3. Respondents executed a waiver or release of all present and future lien rights in exchange for the check of $1985.
4. Immediately after cashing the check for $1985 Respondentw twithout notice or hearing filed a mechancis lien.
5. Immediately after service of the federal summons and complaint starting this action the respondents released the mechanics lien and one minute later filed a writ of attachment.

It is difficult for this Petitioner to find conditions that more clearly spell out "bad faith". Indeed the above allegations go beyond "bad faith" and are pure "fraud". The district court "did wrong" to dismiss without a trial on the merits.

III. ON REMAND WITH LEAVE TO AMEND THIS APPELLANT CAN STATE A STATE TORT CAUSE OF ACTION FOR FRAUD

See Wright's Conn Law of Torts 2nd Ed Ch XVI

CHAPTER XVI

FRAUD, DECEIT AND MISREPRESENTATION

Sec. 134. Introduction.

Sec. 135. Basic Elements of Action in Fraud or Deceit.

Sec. 136. False Representation.

Sec. 137. Fraudulent Intent—Motive.

Sec. 138. Existing Fact.

Of great interest no doubt to this Reviewing Court is the fact that the complaint and amended complaint (Appendix A & B) completely allege the six elements of Fraud in Section 135 of Wrights's Conn Law of Torts.

1. There must be a false representation.

2. The representation must be of an existing fact.

3. The representation must be fraudulently made. (Under the more recent cases a reckless or negligent misstatement may sometimes satisfy this element; and under this reasoning "legal fraud" has become recognized by the courts, where actual fraud may be lacking.)

4. The representation must be made under circumstances which entitle the plaintiff to rely thereon.

5. The plaintiff is induced to rely upon the representation.

6. The plaintiff is damaged as a result of his reliance. (Perhaps nominal damages should be awarded, in any event. See Wright, Conn. Jury Instructions, Section 340 et seq. Also see Wright, Conn. Legal Forms, Book III, Preliminary Law Note to Form No. 0514.)

These various elements will be discussed in the following sections.

See how the complaint already without amendment meets the six requirements for an action for the tort of fraud:

1. Respondents falsely represented to Petitioner that upon payment of $1985 they would release all rights to present and future liens and return and complete work.

2. The release of all lien rights handed to Petitioner in exchange for check for $1985 was an existing fact.

3. The release of lien rights was fraud-

ulent because immediately upon cashing of check for $1985 Respondents filed mechanics lien in the public records of the Town Clerk of Hartford.

4. Under the circumstances Petitioner relied on promises of Respondents and wrote and phoned Respondents to return and complete work.

5. Induced to rely on representation Petitioner signed and delivered check for $1985.

6. As a result of his reliance on representation of respondents the plaintiff suffered great damages; building not completed on tiem, loss of rents, increased costs of interest and taxes, loss of $16,000 in construction money needed, inability to pay construction debts on time with resulting "snowballing " of liens and litigation in state court with subcontractors.

IV. CT REMAND WITH LEAVE TO AMEND PETITIONER CAN STATE A STATE TORT CAUSE OF ACTION FOR ABUSE OF PROCESS BY EXCESSIVE ATTACHMENT.

Wright's Conn Law of Tort's is quoted with authority:

Sec. 163. Abuse of Process.

Abuse of Process is the misuse of process regularly issued, to

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accomplish an unlawful ulterior purpose; and the plaintiff is not bound to prove, as in actions for malicious prosecution or vexatious suit, the termination of the original proceeding, the want of probable cause, or the presence of malice."

Wrights Law of Torts S 163 continued:

Examples of abuse of process would be the attachment of property for more than a writ authorizes, or using a warrant for some other purpose than bringing an accused person before the criminal authorities. Thus it was held that it was an abuse of process for an officer to arrest a store clerk with a warrant, and then bring her to the store for interrogation at one o'clock in the morning instead of taking her to the police station, as a warrant was not designed for this purpose.[28] In that case it was also decided that compensatory damages may be recovered in an action for abuse of process even though there is no malice; but if there is malice, exemplary damages may also be recovered.

In the state court action attachment was for $3,000; after unnumerable jury trial continuances the action was withdrawn and a token out of court settlement made for a fraction of the $3,000 attachment that remained in force for over three years.

Abuse of process has far different standards than Malicious Prosecution which was considered and rejected by the 2nd C.A.

The essential element for a state tort of action for abuse of process appears in the complaint, namely an ulterior unlawful motive to compel Petitioner to pay to Respondents large sums of money that Respondents were not entitled to and to compell such payment by subjecting this Petitioner to the hardships of levying a large attachment upon his property prior to disbursement of remainding constructions money.

Appendix A-4

"Defendants seek to collect money for materials and labor that they refused to deliver and in fact were provided by Plaintiff, the General Contractor"

The fact that four years later Respondents withdrew the action has no bearing on this Petitioner's state tort causes of action.

V. THE DECISION BELOW IS SELF-CONTRADICTORY SINCE CASES CITED SUPPORT DAMAGES WITHOUT "BAD FAITH"

The 2nd CA decision correctly discusses cases that uphold this action. Some of these are.

Rose Chalet Functions v Evans 264 F Supp 790 at P 795

> "we do not yet have from the SUPREME COURT a light or a series of lights to mark S 1983 cases in which the defendants good faith is relevant"

Rose Chalet explores with care the fundamental principle that since in state courts torts it is not necessary to show bad faith then why is bad faith an element in the same cause of action in federal court?

Rose Chalet again P 795:

"We have been told authoritatively that defendants' good faith is irrelevant if under color of state law they deny to Negroes on account of their race the right to vote in a primary. Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987. Damages were recognized as proper even though the public officials, relying on an earlier Supreme Court decision Grovey v. Townsend, 295 U.S. 45, 55 S.Ct. 622, 79 L.Ed. 1292, acted in the wholly justified belief that they were carrying out their duties in a constitutional manner. See P. Freund, Judge Magruder—Federalism, 72 Harv.L.Rev. 1204, 1218.[1]

Lower federal courts have held that where plaintiff brings an action under § 1983 against a defendant police or other official on the ground that defendant by arresting, searching, or taking other police action deprived him of his federal constitutional right, § 1983 does not require that plaintiff allege or prove that defendant abused a privilege or acted in bad faith.[2] Stringer v. Dilger, 313 F.2d 536 (10th Cir.); Anderson v. Haas, 341 F.2d 497 (3rd Cir.). See Note 75 Harv. L.Rev. 40, 214. The cases just considered seem to stand for the proposition that since plaintiff in a state court action complaining of a battery or a trespass need not allege or prove defendant's bad faith, plaintiff in a § 1983 federal action need not plead or prove bad faith when he complains of what is in substance a battery or trespass.

In light of above cases this Petitioner was denied in the lower courts a valid cause of action for denial of due process, a federally guaranteed right. The denial stands undisputed and the releaant law in light of Smaidch, Lynch, Fuentes, etc is undisputed. The Rose Chalet court went on to review cases in which the state tort required a bad faith showing P 796:

> Inasmuch as plaintiff would not have a state tort cause of action against defendants unless it alleged and proved bad faith, there is much to be said for the contention that it ought not to have *for the type of constitutional deprivation here involved* a federal cause of action under § 1983 unless it alleges and proves bad faith.

This would be consistent with Justice Douglas's test in Monroe v. Pape, 365 U.S. 167, 187, 81 S.Ct. 473, 484, 5 L.Ed.2d 492 that 42 U.S.C. § 1983 "should be read against the background of tort liability." See Cobb v. City of Malden, 202 F.2d 701, 707 (1st Cir.); Francis v. Crafts, 203 F.2d 809, 811 (1st Cir.). Cf. Tenney v. Brandhove, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019.

Petitioner contends that "bad faith" is not relevant to a pure federal civil rights action and in any event the complaint contains necessary allegations for two state torts, fraud and abuse of process, neither of which require bad faith in the state courts and thus should not requre bad faith showing in the federal courts.

Thus Petitioner contends which ever way the capricious winds of the 2nd CA blow...."good faith".... "bad faith",... This Petitioner is already covered with proper allegations in his complaint, Appendix A.

VI. CLEAR AND CONVINCING LANGUAGE IN 42 USC 1983 & THE 5th & 14th AMEND. CONTAIN NO "BAD FAITH" LIMITATIONS ON THEIR POWER

Surely if Congress had intended to put a "bad faith" limitation on the civil rights of American Citizens it would have done so in the language of the statutes and not left it up to arbitrary and capricious actions by a variety of district courts or circuit courts to engineer their wn personal prized limitations on these precious rights.

It is inconsistency itself to compare the words spoken by the US SUPREME COURT in Monroe v Pape 365 US at 187.....

> "a man is responsible for all the natural consequences of his actions...."

with the words in the 2nd CA Opinion below P 3285 D-11:

"....the corporat and individual appellees apparently acted on advice of counsel and no evil intention can properly be ascribed to them....."

There was no "evil intent" perambulated about when the US SUPREME COURT made its classic statement as to the power and scope of the civil rights statutes. Monroe v Pape 365 US 180.

Decisions of the US SUPREME COURT repeatedly bypassed the "good faith"..."bad faith" whirlpool to consistently vote that complaint under the civil rights acts should not be dismissed for failure to "state a specific intent to deprive a person of a rederal right"

Monroe v Pape 365 US 167
Pierson v Ray 386 US 547

VII SINCE MONROE, SUPRA, CIRCUITS OTHER THAN THE 2nd CA HAVE CONSISTENTLY AVOIDED "GOOD FAITH" DEFENSES IN AFFIRMING CIVIL RIGHTS COMPLAINTS FOR DAMAGES 42 US 1983

Whirl v Kern 407 U F 2d 781 (5th CA)

The Court of Appeals, Goldberg, Circuit Judge, held, inter alia, that ignorance of sheriff who detained plaintiff in jail almost nine months after dismissal of indictments against him because of a failure to properly process dismissal was no defense to action for deprivation of civil rights because of false imprisonment.

Reversed and remanded.

The above convincing language by the 5th CA most consistent with Monroe clashes violently with the language of the 2nd CA in the opinion in this action:

Opinion P 3285 D-6 :

> "In the absence of bad faith it is therefore apparent that no action lies against DeLaura under S 1983:

The brazen use of the "bad faith" defense by the 2nd CA in this action clashes violently with decisions of the US SUPREME COURT and of other circuits.

Whirl P 787:

> [4] Since Monroe v. Pape, supra, this Court has consistently avoided attaching any requirement of ulterior purpose or improper motive to the statement of a cause of action under 42 U.S. C.A. § 1983. Cf. Nesmith v. Alford, 5 Cir. 1963, 318 F.2d 110; Pierson v. Ray, 5 Cir. 1965, 352 F.2d 213, reversed on other grounds, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288.

The 7th CA using similar reasoning to the 5th CA and closely following US SUPREME COURT decisions rejected the "good faith"-"bad faith" mumbo-jumbo.

Joseph v Rowler 402 2d 367 at 370

Hardwick v Harley 289 F 2d 529 (1961)

VIII. THE 2nd CA ALTHO DIVIDED IS TENACIOUS AND REFUSES TO LET GO OF CONCEPTS SHATTERED BY RECENT CIVL RIGHTS DECISIONS SUCH AS SHAIDACH, MONROE, FUENTES AND LYNCH, SUPRA

Opinion below P 3285 D-11:

Constitutional law, particularly in this difficult and confusing area of state action and due process, is hardly predictable with any degree of certainty. The very recent history of such constitutional litigation in this circuit should convincingly indicate that the role of the prophet is precarious at best.[4]

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4 In *Shirley* v. *State Nat'l Bank*, —— F.2d ——, slip op. 1773 (2d Cir. Feb. 14, 1974) and *Bond* v. *Dentzer*, —— F.2d ——, slip op. 2093 (2d Cir. March 13, 1974), after both panels had split 2-1 over state action issues, rehearings *en banc* were denied on March 29, 1974 by votes of 5-3. In *Jackson* v. *Statler Foundation*, —— F.2d ——, slip op. 2741

The opinion below leans heavilly on what this Petitioner believes to be the worst civil rights decision of the 1970s, incidentally made in the district court of Conn. namely Black Watch Farms, Inc v Dick, 323 F Supp 100.

The Black Watch Farms decision coming well after Shaidach, supra, literally defied the US SUPRME COURT with a "so what" ... attitude. The district court of Connecticut and the 2nd CA are well known for having made far more than their share of "out of the main stream" or backwards looking decisions in civil rights actions. Harsh treatment of this Petitioner in lower court is part of this "backward looking."

The "backward looking" decision herein is similar to those made in recent years in prior cases from the district of Conn.

Griswold v Conn 381 US 479

Boddie v Conn 91 S Ct 780

Lynch v Household Finance 405 US 538

Tucker v Maher 405 US 538
(this action on prior appeal)

CONCLUSION:

For the second time in four years (see 405 US 1052) this Court is requested to summarilly reverse the decision of the Circuit Court of Appeals for the Second Circuit, or in the alternative, probable jurisdiction should be noted.

RESPECTFULLY SUBMITTED

BY_____
PETITIONER
STANLEY V. TUCKER

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Complaint EUGENE V MAHER ET AL

USDC -Conn No 13,786
Filed April 9th,1970

1. This is an action for declaratory & injunctive relief authorized by 42 USC 1983 to secure rights, privileges and immunities secured by the Constitution and laws of the United States.

2. Jurisdiction is conferred on this Court by 28 USC 1343 (3), (4) , 2201 and 2202.

3. This action seeks injunctive relief, both temporary and permanent pursuant to 42 USC 1983 and 28 USC 2281 & 2284 restraining the Defendants from applying, enforcing, executing and implementing Conn G. S. 49-33.

4. This action seeks a declaratory judgment pursuant to 28 USC 2201 & 2202 that Conn GS 49-33 is unconstitutional on its face & as applied to Plaintiff herein.

5. This is a proper case for dtermination by a three-judge district court, pursuant to 28 USC 2281 and 2284 because it seeks a permanent injunction to restrain defendants who are state officers, or local officers performing a state function embodying policies of statewide concern, from applying, enforcing executing and implementing Conn G. S. 49-33.

6. The Plaintiff is an adult citizen of the United States and of the State of Conn. residing in the Town of Hartford.

7. The Defendant, L & M Electric is a private corporation incorporated in the State of Conn. and is instigator of a certain mechanics lien complained of hereinafter, said lien filed in the records of the Town Clerk of Hartford, and levied upon certain real property of Plaintiff consisting of a small apartment building known as 53 Hamilton St., Hartford, said lien is annexed hereto as Exhibit "A". Defendants, JOSEPH D. MAHER and LAWRENCE J. LEVESQUE are offficers of said corporation, L & M Electric Inc, and parties to initiation of said mechanics Lien and Defendant William J. Kotchen is an attorney authorized to practice law befofe the courts of the State of Conn and represents Defendants L & M Electric Co Inc, Joseph D Maher and Lawrence Levesque in the aforesaid lien action filed with the Town Clerk of Hartford. Acting in his official capacity as attorney for the other defendants William J Kotchen had repared the said lien, took under oath the statment of defendant JOSEPH D. MAHER and did cause to be recorded with the Town Clerk of Hartford said lien, thereby attaching real property of Plaintiff.

8. The real property liened and attached was being constructed under a construction mortgage of $64,000 and as a result of the Defendant's lien and attachment approx. $16,000 in unreleased funds could not be released thus denying and depriving Plaintiff of the possession and use of said funds for his continuing well being and livelihood and for payment of normal business expenses and debts in completion of said building.

9. The Plaintiff was given no opportunity to be heard either prior to or within a reasonable time after the lien nor was Plaintiff served at any time with any Writs or other process in respect to said attachments.

10. That The Defendants, L & M ELEC CO INC and JOSEPH D. MAHER and LAWRENCE J. LEVESQUE, are electric contractors and had done work for Plaintiff as General Contractor in wiring of premises known as 53 Hamilton St, Hartford and had last worked in mid-December 1969 when substantial payment of $1905 was made by Plaintiff and at that time Defendants signed a lien waiver expressly releasing any past or future claims. Defendants elected to abandon the project and refused to return to work despite repeated phone calls and letters from Plaintiff inviting them to return and work. See Ex "B".

11. That the lien by Defendants is a fraudulent and illegal one in that it was not filed within the 60 days of completion of delivery of materials or services and by reason thatthe Defendants failed to file their lien within 60 days as required by Conn G. S. 49-34 and further failed to give

notice of intention to lien within 60 days of ceasing work as required by Conn GS 49-35 and is further fraudulent and illegal in that Defendants seek to collect moneys for materials and labor that they refused to deliver and in fact were provided by the Plaintiff, the GENERAL CONTRACTOR.

12. The lien was made pursuant to Conn G. S. 49-33 which permits levying of a lien upon the coaim or pretended claim of any self-professed crdditor against the building or any of its appurtenances being built under the authority of the owner or of the owners duly authorized agent.

13. This statute GS 49-33 permits a lien to be made whether defendant in an action pursuant to which a lien is recorded is a resident or non-resident of the state, without regard to the existance or non-existance of any necessity to protect a plaintiff by obtaining security for any judgment which may be rendered against a defendant.

14. The procedure authorized by the aforementioned statutes provide for no prior determination by an independent third party that a plaintiff's claim has any merit whatsoever or that the remedy of lien is in any way necessary to protect the interests of the plaintiff. A plaintiff in an action pursuant to which a lien is sought required to make oath to the allegations of the lien.

15. The procedure authorized by the aforesaid statute contains no provision permitting a defendant to have the attachment released promptly on the ground that the plaintiff's claim is spurious or without merit nor is there any provision for the right to a prompt and summary defense on the merits.

16. The aforementioned statute on its face and as administered and applied by the Defendants are unconstitutional in that the procedure established by their authority may cause and did cause the plaintiff herein to be deprived of property without due process of law and denied the equal protection of the laws in violation of the 14th Amend. to the U. S. Constitution.

17. Plaintiff has no adequate remedy at law and the Defendants will continue to cause the Plaintiff irreparable injury unless enjoined by this Court.

18. Plaintiff claims damages of $50,000.

WHEREFORE the Plaintiff respectfully prays this Court:

1. Assume jurisdiction and convene a three-judge district court purusuant to 28 USC 2281 and 2284.

2. Enter a final judgment pursuant to 28 USC 2201 and 2202 and Rule 57 FRCP declaring Con Statute cited herein infringes on Plaintiff's rights guaranteed to him under the 14th Amendment to the Constitution of the U. S. & that the statute is unconstitutional on its face and as applied by Defendants herein.

3. Enter a final judgment granting Plaintiff the sum of $50,000 in damages.

4. Order such other and further relief as is deemed just.

5. Grant Plaintiff his costs herein.

By_____
STANLEY V. TUCKER/PLAINTIFF

Appendix A to Complaint Tucker v Maheu
USDC - Conn # 13,786
Filed May 12th, 1970

1. This is an action for declaratory and injunctive relief authorized by 42 USC 1983 to secure rights, privileges and immunities secured by teh Constitution and laws of US.

2. Jurisdiction is conferred on this court by 28 USC 1343 (3), (4) 2201 & 2202.

3. This action seeks injunctive relief, both temporary and permanent pursuant to 42 USC 1983 and 28 USC 2281 & 2284 restraining the Defendants from applying, aforcing, executing and implementing Conn G. S. 52-279, 52-280 & 52-285.

4. This actions seeks a declaratory judgment purusant to 28 USC 2201 & 2202 that Conn GS 52-279, 52-280, & 52-285 are unconstitutional on their face and as applied to Plaintiff herein.

5. This is a proper case for determination by a three-judge district court, pursuant to 28 USC 2281 & 2284 because it seeks a permanent injunction to restrain defendants who are state officers, or local officers performing a state function embodying policies of statewide concern, from applying, enforcing, executing and implementing Conn. GS 52-279, 52-280, & 52-285.

6. The Plaintiff is an adult citizen of the U. S. & of the City of Hartford and of the State of Conn.

7. The Defendants, L & M ELECTRIC CO INC, is a private corporation incorporated in the state of Conn and is the instigator

of an attachment lien complained of hereinafter, said lien filed in the records of the Town Clerk of Hartford, and levied upon certain real property known as 53 Hamilton St, Hartford, said lien is annexed hereto including a common counts writ or complaint as Ex A. JOSEPH D MAHER and LAWRENCE J. LEVESQUE are officers of said corporation, L & L ELECTRIC CO INC, and parties to initiating said attachment lien and Defendant William J. Kotchen is an attorney authorized to practice before the courts of the State of Conn. and represents all of the Defendants in the attachment filed in the Town of Hartford. Acting in his official capacity as commisioner of the Superior Court of Conn. and as attorney for the self-professed creditors William J. Kotchen commanded the Sheriff of Hartford and/or his deputies to levy attachment upon the property of plaintiff under color of the state laws complained of herein. Defendant ANTHONY DaLAURA is a Deputy to the Sheriff of Hartford and attached property of Plaintiff known as 53 Hamilton St, Hartford by leaving a copy of thew Writ of attachment with the Clerk of the Town of Hartford.

8. The real property liended and attached was being constructed under a construction mortgage of $64,000 and as a result of Defendant's lien and attachment approx $16,000 in unreleased funds could not be released thus denying and depriving Plaintiff of the possession and use of said funds for , his continued well being and livelihood and for payment of normal business expenses and debts inc completing building.

9. The plaintiff was given no opportunity to be heard either prior to or within a reasonable time after the lien nor was Plaintiff seeved at any time with any

justification or description of extrordinary circumstances such a would justify a lien.

10. That the Defendants, L & M Electric Co Inc and JOSEPH D MAHER and LAWRENCE J. LEVESQUE are electrical contractors and had done work in 1969 for Plaintiff as General Contractor in wiring of premises known as 53 Hamilton St, Hartford and had last worked mid-December 1969 when a substantial payment of $1985 was made by the Plaintiff and at that time Defendants signed a lien waiver expressly releasing any past or future claims and then elected to abandon the project and refused to return to work despite repeated phone calls and letters from Plaintiff inviting them to return to work.

11. The lien was made under color of Conn GS 52-279, 52-280 and 52-285 which permit levying of a lien upon the claim or pretended claim of any self-professed creditor against the building or any of its appurtenances being built under the authority of the owners duly authorized agent.

12. These statutes complained of permit a lien to be made whether defenant in an action is a resident or non-resident of the state, without regard to the ease with whcih personal jurisdiction over a defendant could be obtained and without regard to the existence or non-existence of any necessity to protect a plaintiff by obtaining security for any judgment which may be rendered against defendant. Simple oath as to allegations is sole requirement.

14. The procedure authorized by the aforesaid statutes contains no provision permitting a defendant to have the attachment released promptly on the ground

that the plaintiff's claim is spurious or without merit nor is there any provision for the right to a prompt and summary defense on the merits.

15. The aforementioned statute on its face and as administered and applied by the Defendants is unconstitutional in that the procedure established by their authority may and did cause plaintiff to be deprived of property without due process of law and denied the equal protection of the laws in violation of the 14th Amend to US constitution.

16. The plaintiff has no adequate remedy at law and the Defendants will continue to cause the Plaintiff irreparable harm and injury unless enjoined by the court.

17. Plaintiff claims damages of $50,000

WHEREFORE plaintiff prays that this court:

1. Assume jurisdiction and convene a three-judge court pursuant to 28 USC 2281& 2284.

2. Enter a final judgment pursuant to 28 USC 2201 & 2202 and Rule 57 FRCP declaring that the Conn G. S. cited herein infringe upon Plaintiff's rights guaranteed to him under the 14th Amend to the US Constitution and that the statutes are unconsitutional on its face and as applied by Defendants herein.

3, Enter a temporary and permanent injunction restraining Defendants from attaching property under the authority of Conn G. S. 52-279, 52-280 and 52-285.

. Enter a temporary and permanent injunction ordering the Defendants to release

forthwith their present attaachment on property of Plaintiff at 53 Hamilton St, Hartford, Conn.

5. Enter a final judgment granting plaintiff the sum of $50,000 in damages.

6. Order such other and further relief as is deemd just.

7. Grant Plaintiff his costs herein.

By_____
STANLEY V. TOCCI
PLAINTIFF

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON D. C. 20543

No 70-249 April 17, 1972

TUCKER V KAHN 405 US 1052

The Court entered today the following order in the above-entitled case:

The petition for a writ of certiorari is granted. The jdugment is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of Lynch v HOusehold Finance Corp 405 US ____ (1972)

Very truly yours

cc: Encl Opinion in Lynch v Household Corp

Michael Rodak, Jr

By_____
Assistant Clerk

STANLEY V. TUCKER v JOSEPH MAHER ET AL

Civil No 13,736

BEFORE: Smith, Circuit Judge, and Blumenfeld and Newman, District Judges

Newman, District Judge:

This case, like Kavanewsky v Greater Development Co of Conn Inc Civ No B-593, decided this date, was brought to challenge the constitutionality of Conn's prejudgment attachment statutes. For all of the reasons stated in Kavanewsky an for the additional reason that the defendants have released the attachment challenged in this suit, the complaint must be dismissed. As in Kavanewsky there is no basis for the assertion of a damage claim against those, who, acting in good faith, secured an attachment under the then existing statutes.

Accordingly the complaint is dismissed.

Dated at Hartford, Conn this 5th day of July 1973

D-1

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 663—September Term, 1973.

(Argued March 18, 1974 Decided May 7, 1974.)

Docket No. 73-2451

STANLEY V. TUCKER,

Plaintiff-Appellant,

—against—

JOSEPH D. MAHER, ET AL.,

Defendants-Appellees.

Before:

LUMBARD, FEINBERG and MULLIGAN,

Circuit Judges.

Appeal from judgment entered in the United States District Court for the District of Connecticut, sitting as a three-judge court, dismissing complaint challenging the constitutionality of Connecticut's materialman's lien and prejudgment attachment statutes.

Affirmed.

STANLEY V. TUCKER, Hartford, Connecticut, *Pro Se.*

MAURICE T. FITZMAURICE, Hartford, Connecticut (Regnier, Moller & Taylor, on the brief), *for Defendants-Appellees.*

MULLIGAN, *Circuit Judge:*

The appellant, Stanley V. Tucker, acting pro se, commenced an action in the United States District Court for the District of Connecticut on April 9, 1970, challenging the constitutionality of Conn. Gen. Stat. Ann. § 49-33, which provides for the filing of materialmen's liens that become encumbrances upon title to real property. Tucker is a real estate developer in Connecticut and a materialman's lien had been filed against certain of his real property in Hartford, Connecticut on March 3, 1970, by an electrical subcontractor, L & M Electric Co., Inc. Subsequently, the subcontractor sued Tucker for $3000 damages in a civil suit in the state court of Connecticut arising from work performed in the construction of an apartment house where Tucker was allegedly acting as a general contractor. The materialman's lien was released and, in conjunction with the state suit, a real estate attachment was substituted as security on April 17, 1970. Tucker then amended his federal complaint to challenge the constitutionality of Connecticut's prejudgment attachment statutes, in particular Conn. Gen. Stat. Ann. §§ 52-279, 52-280 & 52-285. He sought both injunctive and declaratory relief, as well as $50,000 damages, by reason of an alleged deprivation of property in violation of his constitutional rights to due process and equal protection of law under the fourteenth amendment. In addition to L & M Electric Co., the complaint named as defendants Joseph D. Maher and Lawrence J. Levesque, who are officers of L & M; William J. Kotchen, who is an attorney representing the corporation and its officers; and Anthony DeLaura, who is a Deputy to the Sheriff of Hartford. All are alleged to have participated in the procurement and filing of either the materialman's lien or the attachment.

On November 16, 1970, Chief Judge M. Joseph Blumenfeld dismissed the complaint[1] on the ground that there was no subject matter jurisdiction under 28 U.S.C. § 1343(3), relying primarily upon the personal rights-property rights dichotomy drawn in *Eisen* v. *Eastman*, 421 F.2d 560 (2d Cir. 1969). This Court affirmed the dismissal, *Tucker* v. *Maher*, 441 F.2d 740 (1971)(*per curiam*). After the affirmance, the Supreme Court decided *Lynch* v. *Household Fin. Corp.*, 405 U.S. 538 (1972), which rejected the distinction made in *Eisen*. On April 17, 1972, the Supreme Court vacated the judgment in this case and remanded it to this Court, 405 U.S. 1052, which in turn remanded to the District Court for the District of Connecticut, Doc. No. 71-1025 (Jan. 25, 1973).

On July 6, 1973, a three-judge court consisting of Senior Circuit Judge J. Joseph Smith and District Judges M. Joseph Blumenfeld and Jon O. Newman, once again dismissed the complaint. Civ. No. 13,786 (D. Conn.). The court held that the request for injunctive relief was moot and inappropriate since the Connecticut General Assembly had implicitly annulled the challenged attachment statutes by enacting a new statute which became effective on May 30, 1973 and which provided for an adversary hearing prior to attachment (Public Act No. 73-431, 1973 Session). The court added as an additional reason for its declination of injunctive relief the fact that the defendants had already released the attachment challenged in the suit. The civil

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1 This is one of three cases which were dismissed by the District Court for the District of Connecticut on November 16, 1970, the other cases being *Tucker* v. *Connecticut Mason Contractors, Inc.*, Civ. No. 13,785, and *Tucker* v. *Anderson*, Civ. No. 13,787. In each case, Tucker challenged the constitutionality of Connecticut's prejudgment attachment statutes. *Anderson* involved an attachment of Tucker's real property obtained in conjunction with a civil suit to recover $9000 in arrearages for child support. The attachment involved in *Mason Contractors* was obtained by a materialman.

suit in the Connecticut court which prompted the attachment was settled when Tucker paid a compromise amount to the appellees.

On appeal the sole contention is that the court below erred in dismissing the complaint without a trial on the damage issue. Relying on *Karanewsky* v. *Greater Dev. Co.*, Civ. No. B-593 (D. Conn. July 6, 1973), the court held that "there is no basis for the assertion of a damage claim against those who, acting in good faith, secured an attachment under the then existing statutes." *Karanewsky*, in turn, depended upon an opinion of Judge Newman, *Pfotzer* v. *Dorr-Oliver, Inc.*, Civ. No. B-587 (D. Conn. May 11, 1973), which held that in the absence of any showing that persons have acted in bad faith in securing an attachment, they will not be required to respond in damages for proceeding under statutes that had not then been ruled invalid.

The initial question we face is whether or not this court has jurisdiction to hear this appeal which is at least nominally from a judgment of dismissal entered by a three-judge court. The fact that all of the parties agree that we do is consoling but obviously they cannot confer jurisdiction upon us. The question is vexing and the rules of the game are imprecise. Hopefully, the exercise will become obsolete. See generally James L. Oakes, Second Circuit Note 1972 Term-Foreward: The Three-Judge Court and Direct Appeals to the Second Circuit, 48 St. John's L. Rev. 205 (1973).

The Supreme Court has exclusive appellate jurisdiction from orders "granting or denying . . . an interlocutory or permanent injunction. . . ." 28 U.S.C. § 1253; see *Lynch* v. *Household Fin. Corp., supra*, 405 U.S at 541 n.5. In our view, the appeal here from the dismissal of the complaint is not, in essence, an appeal from such an order. The release of the materialman's lien and the attachment prior to judg-

ment, as well as the enactment of a new statute (two days after the argument before the court), which in effect repealed the legislation challenged by the complainant, rendered moot the injunctive relief which was sought. *Hernandez* v. *European Auto Collision, Inc.*, 487 F.2d 378, 386-87 (2d Cir. 1973); *Kerrigan* v. *Boucher*, 450 F.2d 487 (2d Cir. 1973); see *Rosado* v. *Wyman*, 304 F. Supp. 1351 (E.D.N.Y.), aff'd, 414 F.2d 170 (2d Cir. 1969), rev'd on other grounds, 397 U.S. 397 (1970). The appellant here does not seek review of the order denying injunctive relief but is instead concerned with the claim for damages. The appeal therefore is properly to this court. See *Mitchell* v. *Donovan*, 398 U.S. 427 (1970) (*per curiam*); 9 J. Moore, Federal Practice ¶ 110.03[3], at 77-85 (2d ed. 1973).

Had the fact of release and the repeal of the statute which was challenged been made known to the court prior to the argument, it might well have been dissolved, as happened in *Rosado* v. *Wyman*, *supra*, since the injunctive relief sought was obviously mooted. In such case the appeal would clearly be to this court. In *Rosado*, we affirmed the dissolution, 414 F.2d 170 (1969), rev'd on another issue, 397 U.S. 397 (1970), after the Supreme Court had dismissed a direct appeal from the judgment of the three-judge court for want of jurisdiction, 395 U.S. 826 (1969) (*per curiam*). Having heard the argument as a three-judge court, the court did not dissolve itself. It would be an exercise in futility to send the case back to dissolve the court and inevitably have a single judge reach the same conclusion. See 9 Moore's Federal Practice ¶ 110.03 [3], at 77-79 (2d ed. 1973). See also our discussion in *Jordan* v. *Fusari*, slip op. 3059, 3062-63 n.2 (April 29, 1974). In view of the unusual procedural posture of the case, the fact that the litigation has persisted for four years and the Supreme Court's admonishment that its appellate ju-

risdiction is to be narrowly construed, *Gunn* v. *University Comm. to End the War*, 399 U.S. 383, 387 (1970), we believe that the appeal should now be decided in this forum.

The question of what constitutes a constitutional tort under § 1983 has provoked learned comment[2] but actual litigation has not provided us with much precedential material. We can, however, at the outset rather easily dispose of the claim against the Deputy Sheriff DeLaura. There is nothing in the record to suggest that he was acting in bad faith. His sole role here was to serve a copy of the writ of attachment upon the Clerk of the Town of Hartford. There is no indication that the writ was facially defective, that he was improperly motivated, or that he deviated from the statutory procedure. This is not a case of a peace officer who is making an arrest claiming that he had probable cause to believe that a crime was being committed. In such a case there may be some question of good faith which will raise a factual question. Here, there is none. DeLaura was performing a ministerial function which he was obligated to do.

The only basis for Tucker's claim against DeLaura is that the statute under which he proceeded was unconstitutional. It is well settled, however, that a peace officer cannot be charged with the responsibility of predicting the future course of constitutional law. *Pierson* v. *Ray*, 386 U.S. 547, 557 (1967). In the absence of bad faith, it is therefore apparent that no action lies against DeLaura under § 1983. There is abundant authority for this proposition even where a warrantless arrest is made. See, e.g.,

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2 See, e.g., Shapo, Constitutional Tort: *Monroe* v. *Pape*, and the Frontiers Beyond, 60 Nw. U.L. Rev. 277 (1965); Comment, Choice of Law under Section 1983, 37 U. Chi. L. Rev. 494 (1970); Comment, Civil Actions for Damages Under the Federal Civil Right Statutes, 45 Texas L. Rev. 1015 (1967); Note, Constitutional Torts: Section 1983 Redress for the Deprived Debtor, 14 Wm. & Mary L. Rev. 627 (1973).

Anderson v. *DeCristofalo*, slip op. 2087 (2d Cir. Mar. 13, 1974) (*per curiam*); *Hill* v. *Rowland*, 474 F.2d 1374 (4th Cir. 1973); *Rodriguez* v. *Jones*, 473 F.2d 589 (5th Cir.), cert. denied, 412 U.S. 593 (1973). A fortiori, where an attachment is effected by a sheriff filing a writ with a town clerk upon an affidavit made by a party which is ancillary to a state civil action, we have no hesitation in finding that he has no personal tort liability under § 1983.

The role of the private party appellees, litigants and their counsel, is, of course, distinguishable, but upon analysis we find no sound basis for finding liability and no reason to remand for trial. The only case we have found squarely in point so holds. In *Rios* v. *Cessna Fin. Corp.*, 488 F.2d 25 (10th Cir. 1973), a finance corporation brought a replevin action which resulted in the seizing of airplanes owned by the plaintiff. The New Mexico statute was later declared unconstitutional in so far as it provided for a prejudgment taking of property without notice. The court held:

> A statute is presumed to be constitutional until struck down as unconstitutional. Cessna Finance followed the statutory procedure in bringing its replevin action. We therefore hold that § 1983 is not applicable because damages are not collectible in a civil right action against one who followed a statutory procedure presumed to be constitutional. . . . And although Rios now questions the good faith of Cessna Finance in proceeding under the replevin laws of New Mexico, we believe no factual issue on the question exists.

488 F.2d at 28 (citation deleted).

The only case we have found in this Circuit which is instructive is *Fleming* v. *McEnany*, 491 F.2d 1353 (1974). There a plaintiff sought to recover damages against a

private citizen and her attorney for false imprisonment. A civil capias writ and a complaint had been issued which resulted in the plaintiff's incarceration in a Vermont County Jail for a twenty-day period. The federal complaint urged that the Vermont statute violated due process under the fourteenth amendment since it made no provision for a judicial hearing prior to arrest. *Sniadach* v. *Family Fin. Corp.*, 395 U.S. 337 (1969). The majority, while admitting that legal defenses afforded lawyers and clients for the issuance of a defective capias are not as broad as those which protect state officers, nonetheless held that under Vermont law there was no tort liability merely because the statute under which the plaintiff was arrested was later held to be unconstitutional. The court rejected the theory that counsel should have anticipated the invalidation of the Vermont statute on the basis of the prior decision of the Supreme Court in *Sniadach*.

Fleming is distinguishable, of course, since it was a diversity action with the court applying Vermont state law to determine whether or not tort liability for false imprisonment existed. While it was not a § 1983 case, a review of relevant authority indicates that some nexus does exist between the nebulous § 1983 tort and its conventional common law counterpart. This much was made initially clear by Mr. Justice Douglas in *Monroe* v. *Pape*, 365 U.S. 167, 187 (1961), when he indicated that the statute "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." See also *Pierson* v. *Ray*, *supra*, 386 U.S. at 556 57.

Later, in *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 231-33 (1970), Mr. Justice Brennan in his separate opinion, concurring in part and dissenting in part, pointed out that the common law is not an infallible guide. He argued that where there has been a denial of equal protection as

the result of racial discrimination, the central evil that § 1983 was designed to eradicate, a plaintiff should prevail upon the mere showing of the proved violation even if the discriminator was unaware of the constitutional dimension of his wrong doing. It seems to be rather well established that in such cases no wrongful intent, i.e., an intention to deprive a person of his constitutional rights, is necessary. *Monroe* v. *Pape*, *supra*, 365 U.S. at 187.

This approach was taken by Judge Wyzanski in *Rose Chalet Fanctions Corp.* v. *Evans*, 264 F. Supp. 790 (D. Mass. 1967), and also by Judge Goldberg in *Whirl* v. *Kern*, 407 F.2d 781 (5th Cir.), cert. denied, 396 U.S. 901 (1969), which was cited with approval by Mr. Justice Brennan in *Adickes*. It must be emphasized that there is no element of discrimination, racial or otherwise, in the case before us. Nor is there any deprivation of personal liberty involved. Although *Lynch* v. *Household Fin. Corp.*, *supra*, does give a federal court jurisdiction under § 1343(3) of controversies involving deprivation of property, as well as those of personal liberty, the cases we have referred to indicate that it does not follow that the element of § 1983 scienter is identical.[3]

Mr. Justice Brennan in *Adickes* pointed out that "[i]n some types of cases where the wrong under § 1983 is closely analogous to a wrong recognized in the law of torts, it is appropriate for the federal court to apply the relevant tort doctrines as to the bearing of particular mental elements on the existence and amount of liability." 398 U.S. at 231-32. Thus, while normally the requirement of ulterior purpose or improper motive is not necessary to establish a § 1983 violation, as Judge Goldberg observed

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3 See also Chief Judge Kaufman's dissenting opinion in *Fleming* v. *McEnany*, 491 F.2d 1353, 1360 (1974), which emphasizes the primacy of concern for rights of personal liberty as compared with property deprivation.

in *Whirl* v. *Kern*, *supra*, 407 F.2d at 787-88: "[W]hen an essential element of the wrong itself under well established principles of tort law includes the demonstration of an improper motive as in malicious prosecution, . . . then such principle becomes a part of sec. 1983."

The claim here, in essence, is one of malicious prosecution. The major thrust of the complaint is that the appellees wrongfully obtained a materialman's lien and commenced a civil action against the appellant which was baseless, and in so doing they utilized the provisional remedy of attachment which was unconstitutional, since the statute provided no prior opportunity for him to contest the debt and thus deprived him of the use of his property. There is no doubt but that a wrongful deprivation of property in a civil proceeding may be the basis for a subsequent common law action for malicious use of civil process. Restatement of Torts § 677 (1938); W. Prosser, Law of Torts § 114 (3d ed. 1969). However, the complaint here is fatally defective, in our view, and was properly dismissed.

The common law tort of malicious use of civil process does require that the plaintiff establish an improper motive on the part of the defendant. More precisely, the plaintiff must establish that the civil proceedings were initiated without probable cause and primarily for a purpose other than that of securing the adjudication of the claim on which the proceedings were based. Restatement of Torts, *supra;* W. Prosser, Law of Torts, *supra.* The Connecticut statutes involved here to our knowledge have never been declared unconstitutional. The court below never reached the issue because the controversy had become mooted. However, assuming their unconstitutionality, we cannot find that their utilization by the appellees constitutes the scienter required to establish the tort.

The corporate and individual appellees apparently acted on the advice of counsel and no evil intent can be properly ascribed to them. See Restatement of Torts, *supra*, § 675, Comment on clause (b)(1938). Nor can we attribute any sinister motive to counsel. He utilized statutory procedures which were the traditional legal processes employed by contractors and materialmen to collect debts incurred in the course of their business activities. The statutes had not then nor have they been since declared unconstitutional. On the contrary, on February 25, 1971, some ten months after the complaint was amended to challenge the constitutionality of the prejudgment attachment statutes of Connecticut (Conn. Gen. Stat. Ann. § 52-279 et seq.), District Judge Zampano held that they were constitutional, distinguishing *Sniadach*. *Black Watch Farms, Inc.* v. *Dick*, 323 F. Supp. 100 (D. Conn. 1971). Because the Supreme Court in *Sniadach* held another statute in another State unconstitutional, we are urged in effect to find that counsel should have attributed constitutional infirmity to the Connecticut statutes and that his failure to do so is tantamount to the institution of civil proceedings without probable cause and for an improper motive. We cannot accept this as a reasonable proposition.

Constitutional law, particularly in this difficult and confusing area of state action and due process, is hardly predictable with any degree of certainty. The very recent history of such constitutional litigation in this circuit should convincingly indicate that the role of the prophet is precarious at best.[4] We think, as a majority of this

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4 In *Shirley* v. *State Nat'l Bank*, —— F.2d ——, slip op. 1773 (2d Cir. Feb. 14, 1974) and *Bond* v. *Dentzer*, —— F.2d ——, slip op. 2093 (2d Cir. March 13, 1974), after both panels had split 2-1 over state action issues, rehearings *en banc* were denied on March 29, 1974 by votes of 5-3. In *Jackson* v. *Statler Foundation*, —— F.2d ——, slip op. 2741

court did in *Fleming* v. *McEnany*, *supra*, that counsel here had a right to rely on the statutory law of the jurisdiction which had not been repealed or replaced, or declared unconstitutional by any competent court at the time it was utilized. If counsel had failed to file the lien to protect his client, he might well be exposed to personal liability. State legislation is under increasing constitutional attack but until the assault is successful, attorneys should be entitled to rely upon the presumption of constitutionality. Certainly their dependence upon a statute later found vulnerable is not to be equated with the malevolent intent basic to this particular tort, which Professor Prosser tells us is not even recognized in a large minority of states. W. Prosser, Law of Torts, *supra*, at 870.

Aside from the claimed unconstitutionality of the statutes, there is nothing of substance in the complaint to justify any inference of improper motive. The appellant urged that the materialman's lien was defective in that it did not comply with pertinent time limitations in the statute. However, it is significant that the statutory law (Conn. Gen. Stat. Ann. § 49-51) provided him with a remedy and an opportunity to contest the lien which he never exercised. He further claims that he never owed the money but he never established this in any court and in fact he settled the claim by payment. The tort of malicious use of civil process also requires as an essential element that the civil action giving rise to the tort claim be terminated in the plaintiff's favor. Restatement of Torts, *supra*, § 677; W. Prosser, Law of Torts, *supra*, at 873. This the appellant of course has failed to establish. The

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(2d Cir. April 5, 1974), again a state action case, a rehearing *en banc* was also denied by a failure of a majority of the active judges to vote in favor of such reconsideration; the vote was 4-4, —— F.2d at ——, slip op. at 2764.

lien and attachment procedures here employed were merely ancillary to an underlying contractual claim. The merits of that claim have never been decided in favor of the plaintiff. He deliberately chose not to contest them and in fact paid a sum of money in settlement. In our view, he therefore has no § 1983 claim. There is nothing for a jury to determine and we therefore affirm.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Present: HON J. EDWARD LUMBARD
HON WILFRED FEINBERG
HON WILLIAM HUGHES MULLIGAN,
Circuit Judges

Docket No 73-2451

TUCKER v MAHER ET AL

A Petition for a rehearing having been filed herein by counsel for appellant,

Upon consideration thereof, it is Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk.

JUNE 5, 1974

AFFIDAVIT OF SERVICE BY MAIL

State of Conn)
County of Hartford) ss

I, Stanley V. Tucker, do hereby state that I have on this 30 day AUg. 1974 . served three copies of the within Petition For Certiorari in Tucker v Maher, et al, on the Respondent by mailing postage prepaid first class and by depositing in the U. S. mail box at Hartford Conn this date addressed as follows:

Edmund T. Currin, Esq
41 Lewis Street
Hartford, Conn 06101

STANLEY V. TUCKER

Sworn to and subscribed to before me this 30 day of August 1974

ABEL M. TANGERONE
NOTARY PUBLIC

My commission expires 3/31/74